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No. 02-1620

IN THE

Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. and NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners the Independent Insurance Agents and Brokers of America, Inc. and the National Association of Professional Insurance Agents, Inc. respectfully submit this Reply to the Brief for the Respondents in Opposition to the Petition for a Writ of Certiorari.

REPLY

I. THE FOURTH CIRCUIT'S JUDGMENT BELOW CONFLICTS WITH THE FIRST CIRCUIT'S DECISION IN *BOWLER*, WARRANTING REVIEW

Respondents make no credible attempt to deny the inescapable conflict between the judgments entered by the Fourth Circuit below and by the First Circuit in *Bowler v. Hawke*, 320 F.3d 59 (1st Cir. 2003). Each court reached exactly the opposite conclusion regarding the force and effect of a letter opinion by the Comptroller of the Currency ("OCC") purporting to preempt state insurance law as applied to national banks and thus rendered squarely conflicting judgments regarding the enforceability of virtually identical state insurance consumer protection laws.

The Fourth Circuit determined that the OCC has sufficient interpretive authority to opine that West Virginia insurance laws are preempted under Section 104(d)(2) of the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (1999).[1] In its view, an OCC opinion such as the one at issue here has the full force and effect of law unless overturned by a court. Petitioners' Petition For A Writ of Certiorari ("Pet.") at 14-15, Appendix ("Pet. App.") at 4a-6a. The resulting judgment therefore effectively prohibits West Virginia, and perhaps other States in the Fourth Circuit, from enforcing any validly-enacted insurance laws against

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[1] Respondents' allegation that Judge Luttig may not have found an Article III case or controversy, Brief For The Respondents In Opposition ("Opp.") at 12 n. 2, must be rejected. Judge Luttig's agreement with the lead opinion's conclusion on that issue was a necessary predicate to his finding the laws preempted. Had he concluded, as Respondents' posit, that the dispute was not justiciable, he could not have reached the merits of the preemption question.

national banks that the OCC deems preempted. Pet. App. A at 4a; *see also* Pet. at 14-15.

In contrast, on its review of a virtually identical OCC letter opinion concluding that similar provisions of Massachusetts insurance law are preempted, the First Circuit held that the OCC lacks appropriate interpretive authority under GLBA § 104. *Bowler*, 320 F.3d at 62, Pet. App. C at 26a-27a. In the First Circuit's view, such a letter opinion by the OCC is purely advisory and has no effect whatsoever on a State's ability to enforce its insurance laws. *Id.* at 63, Pet. App. C at 27a. For that reason, the First Circuit's resulting judgment effectively permits the continued enforcement of the Massachusetts' insurance consumer protection provisions at issue there. *Id.*, Pet. App. C at 27a; *see also* Pet. at 15.

These two outcomes cannot be reconciled. Contrary to Respondents' contention, the fact that the First Circuit focused on the lack of a justiciable "regulatory conflict" whereas the Fourth Circuit concluded that the case presented a justiciable controversy, *see* Opp. at 11-12, only confirms the conflict. The First Circuit found no "regulatory conflict" based on its conclusion that the OCC opinion was merely non-binding "informal agency guidance." *Bowler*, 320 F.3d at 63, Pet. App. C at 27a. As such, the challenged Massachusetts laws remain fully enforceable against all participants in the insurance industry, including national banks. The Fourth Circuit, on the other hand, not only deemed a similar OCC opinion binding agency action but action sufficiently authoritative to warrant unbridled deference by the courts. That deference produced a final result directly contrary to the result reached by the First Circuit – namely, that the challenged West Virginia state laws are *not* enforceable against national banks in that State. Respondents' notion that two decisions with exactly opposite outcomes regarding the enforceability of similar state laws

do not present squarely conflicting judgments therefore must be rejected. *See also* Pet. at 14-16.

Resolution by this Court of the conflict is essential to the future functioning of the regulatory regime that Congress established under the GLBA. *See* Pet. at 16-17. The conflict creates confusion over the appropriate roles of state and federal regulators vested with authority under that statute. Moreover, the application of conflicting standards to the type of consumer protections implicated here threatens to dismantle the entire body of important state consumer protection regulation that has been in place in the States for well over a century. Finally, because at least 15 other States have laws in place that are substantively identical to one or more of the provisions at issue here and in *Bowler*, resolution of this case affects the continued ability of other state insurance departments to exercise their traditional police power to regulate the sale of insurance within their borders.[2]

II. PETITIONERS HAVE A RIGHT TO SEEK REVIEW OF THE CONFLICT

Unable to deny the obvious circuit conflict, Respondents instead contend that Petitioners are not proper parties to

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[2] Review also is warranted because the Fourth Circuit's judgment conflicts with this Court's decisions in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. at 18-27. Respondents make no serious attempt to refute these conflicts. They fail, for example, to respond to a single of Petitioners' cases from which the *Barnett* standard was derived, Pet. at 19-22, and instead summarily assert that, because the OCC (and Fourth Circuit) summarily *claimed* to apply *Barnett*, their conclusions were correct. Opp. at 15. Respondents likewise fail to articulate how the Fourth Circuit in any manner conducted the independent judicial review that *Skidmore* requires.

invoke this Court's certiorari jurisdiction. Specifically, they make the novel contention that a person whose intervention was *granted* cannot seek review under 28 U.S.C. § 1254 unless this Court first reviews the propriety of the grant of intervention. *See* Opp. at 7-8. As an initial matter, it is noteworthy that Respondents have not preserved their challenge to the Fourth Circuit's grant of Petitioners' original motion to intervene through the filing of a cross-petition for a writ of certiorari on that question. Moreover, Petitioners are proper parties before this court in any event because they unquestionably satisfy both the constitutional and prudential standing requirements necessary for this action to proceed even absent the parties on whose behalf they intervened.

The Fourth Circuit granted Petitioners' intervention motion below following full briefing by both Petitioners and Respondents and no objection from West Virginia. Section 1254 expressly allows any "party" to seek certiorari, and this Court has made clear in the context of § 1254 that intervenors in lower federal courts may seek review on their own. *Maine v. Taylor*, 477 U.S. 131, 136 (1986). *See also Schneider v. Dumbarton Developers Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."); 9 Moore's Federal Practice ¶ 203.06 pp. 3-20 (1987) ("One who is not an original party to a lawsuit may of course become a party by intervention.").

That the parties on whose side Petitioners intervened – the Insurance Commissioner and State of West Virginia – have elected not to participate in the Petition does not render Respondents' assertion any more legitimate. It is well-settled that "intervenors in lower federal courts may seek review in this Court *on their own*, so long as they have 'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity." *Taylor*,

477 U.S. at 136 (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980)) (emphasis added). Even in *Diamond v. Charles*, 476 U.S. 54, 61 (1986) – the only case cited by Respondents on this point involving a party whose intervention motion had been granted below[3] – the Court made clear that a party granted intervention below may in fact proceed regardless of whether the party on whose behalf they intervened is still present in the action as long as the intervenor can demonstrate Article III standing. *Diamond* thus *supports* Petitioners' ability to proceed notwithstanding West Virginia's decision not to appeal. *See* 476 U.S. at 68 (intervenor may initiate appeal absent party on whose side he intervened if he can demonstrate Article III standing); *see also Lloyd v. Alabama Dept. of Corrections*, 176 F.3d 1336, 1339 n.2 (11th Cir. 1999) (noting same).

There is no question that Petitioners satisfy the standing requirements of both Article III as well as any additional prudential standing requirements necessary for this action to proceed. Article III requires a federal plaintiff to show three factors: (1) "injury in fact," a harm suffered by the plaintiff that is concrete and actual or imminent; (2) "causation," a fairly traceable connection between the injury and the conduct of the defendant; and (3) "redressability," a likelihood that requested relief will redress the alleged injury. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-104 (1998).

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[3] Respondents' only other authorities on this point involved petitioners that had been *denied* leave to intervene below. *See* Opp. at 7-8 (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (because petitioner failed to appeal denial of motion to intervene, Court could not review); and *International Union, United Automobile Workers v. Scofield*, 382 U.S. 205 (1965) (Court is permitted to review orders denying intervention)).

Where, as here, the petitioning parties are trade associations, the relevant inquiry is whether their members possess standing in their own right.[4] The injury that Petitioners' member organizations are suffering is economic in nature. Specifically, their members are subject to state insurance regulations in West Virginia that no longer apply to national banks. The banks' unrestrained entry into the marketplace for general insurance in West Virginia affords them a significant competitive edge over Petitioners' members. Their members' stake in the outcome of this case is so substantial that Petitioners initiated exactly the same claims against Respondents in the U.S. District Court for the District of Columbia prior to West Virginia's commencement of its lawsuit in the Fourth Circuit. *Independent Ins. Agents of Am., Inc. v. Hawke*, No. 01-cv-02356 (D.D.C.) (filed November 13, 2001).[5]

The causation requirement is easily met and is unchallenged by Respondents. The banks' unrestrained entry into the marketplace is traceable to the challenged OCC Preemption Opinion, which removed those restraints by deeming them preempted and anticipating reliance on that conclusion by national banks.

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[4] Courts also look at two additional factors for association standing: whether the interests that the suit seeks to vindicate are germane to the association's objectives; and whether the participation of individual members is necessary for the relief requested. *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Respondents do not dispute the presence of these factors and, furthermore, they are easily met. Petitioners regularly advocate on behalf of their members in both legislative and judicial arenas; and, because only injunctive relief is sought, the participation of individual members in this lawsuit is unnecessary.

[5] Notably, neither in D.C. District Court nor in the Fourth Circuit did Respondents challenge Petitioners' constitutional standing.

Finally, a decision by this Court in Petitioners' favor – on either the agency authority issue or the merits of the preemption dispute – is likely to redress Petitioners' injuries. Specifically, if this Court agrees that the OCC lacked authority to issue an opinion purporting to preempt state law under GLBA § 104(d)(2) and reverses the Fourth Circuit, then the now-preempted West Virginia laws once again become enforceable against national banks, thereby removing the economic threat to Petitioners' members caused by non-enforcement. Even if the Court disagrees with Petitioners regarding the OCC's authority, however, a finding in their favor on the merits of the preemption question also produces the same result.

Respondents' sole argument on redressability is their speculation that Petitioners "might have difficulty" establishing that West Virginia will in fact enforce its laws. Opp. at 10. That hypothesis, however, is contrary to the basic presumption that a State will enforce the laws that its legislature enacts. *See, e.g., Taylor*, 477 U.S. at 136-37 (finding State's stake in litigation substantial because "a State clearly has a legitimate interest in the continued enforceability of its own statutes").

To satisfy the redressability requirement of Article III, moreover, Petitioners must show only that a favorable decision is *likely* to redress their injury, not that a decision *will inevitably* lead to that result. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978) ("Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief."). In *Duke Power*, for example, the Court found it unnecessary for the plaintiffs to rebut claims about what *might have happened* had Congress not enacted legislation limiting

liability for nuclear accidents. *Id.* at 77-78. By the same token, it is not necessary for Petitioners to answer Respondents' hypothesis that the West Virginia Insurance Commissioner – who initiated the Fourth Circuit lawsuit and consistently argued that the laws at issue were *not* preempted – might choose not to enforce them.[6]

Insofar as prudential standing is concerned, Petitioners also meet the "zone of interests" test that this Court has articulated to resolve that inquiry. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (prudential standing exists where "the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute . . . in question"). The GLBA subjects Petitioners' members, like all financial institutions, to regulation according to the financial functions in which they participate. *See* Pet. at 7-11 (discussing GLBA's regulatory regime). The OCC has interpreted the GLBA to Petitioners' detriment. Petitioners have prudential standing under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to challenge that interpretation, as they do to challenge any administrative agency interpretation of a statutory scheme that subjects their members to regulation and directly affects their economic interests. *National Credit*, 522 U.S. at 488-89 (competitors of financial institutions had prudential standing under the APA to challenge agency action that relaxed restrictions on those institutions).

That the statutory provision on which West Virginia relied to initiate its petition in the Fourth Circuit – GLBA § 304, 15 U.S.C. § 6714 – establishes a specific, expedited

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[6] Commissioner Cline's decision not to seek this Court's review just as likely may have been a question of how best to spend limited resources than the silent statement of her "acquiescence" that Respondents assume it to be.

procedural mechanism for one GLBA functional regulator to challenge another is irrelevant. The addition of this mechanism to the repertoire of tools available to regulators to carry out their roles under the GLBA took nothing away from the substantive or procedural rights of non-regulators and therefore does not justify depriving Petitioners of their right to challenge final agency action as the tenets of administrative law unquestionably permit them to do. *See, e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (reviewing OCC's position as expressed in a letter opinion); *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (same); *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 405 (D.C. Cir. 1997) (agency interpretation set forth in letter opinion is final action if approved by agency head, subject to formal agency process and not labeled tentative).

CONCLUSION

For the foregoing reasons and those discussed in the Petition, Petitioners respectfully urge this Court to grant the requested Writ of Certiorari.

Respectfully submitted,

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